IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHARLES CHRISTOPHER HODGES, Appellant.	)	2 CA-CR 2006-0413 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060591

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Michael T. O'Toole — Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri — Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Charles Hodges was convicted after a jury trial of leaving the scene after causing an accident involving death, a class three felony. The trial court suspended the imposition of sentence and placed Hodges on intensive probation for five years. On appeal, Hodges claims there was insufficient evidence proving he caused the accident, and the court's failure sua sponte to give an additional instruction to the jury on the issue of causation was fundamental error. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Hodges. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In the morning of February 1, 2006, John Hemphill and his brother-in-law left a bookstore on Campbell Avenue in Tucson and attempted to cross the street to get to their vehicle. They were crossing at the intersection of Water Street and Campbell, where there was no traffic signal and no marked crosswalk. They had reached the center of Campbell and "stopped in the turn area [and waited] for other traffic to stop." One southbound white vehicle stopped for the men and Hemphill began to cross, but the vehicle Hodges was driving "swerve[d]" around the white car into a different southbound lane. When Hodges saw Hemphill, he attempted to brake his vehicle to avoid him to the point that "smoke [came] out from the tires," but was unable to avoid striking Hemphill.

¶3 The speed limit on Campbell Avenue was thirty-five miles per hour. Hodges was traveling at a minimum speed of forty-four miles per hour. One witness testified the car

"was going quite fast." A Tucson police officer in the traffic investigation unit testified that, had Hodges been driving at thirty-five miles per hour, the accident would not have occurred.

¶4 After striking Hemphill, Hodges stopped his car. He and his passenger, Nichelle Jones, got out and walked toward Hemphill. Jones was "freaked out" and was tugging on Hemphill, yelling at him to get up. At some point, Hodges and Jones got back in the car and "dr[o]ve[] away very quickly."

¶5 A motorist who had arrived at the scene after the accident saw Hodges's vehicle "speed[] up behind [him]" and stop at a stop sign. The motorist knew that Hodges's vehicle had been in the collision because of the damage on it. The motorist stopped his truck and told Hodges and Jones "[they] [we]re not going to go anywhere." A second car pulled up behind Hodges and "blocked him in." Hodges told the motorist "he couldn't stay 'cause he didn't have a license." Hodges "walked away towards the scene like he was going back [to the accident]" but "was gone" soon after. He and Jones "ran down [an] alleyway" and were later picked up by Jones's mother and driven to Jones's home. Ownership papers found in Hodges's vehicle led police to his address.

Discussion

¶6 Hodges asserts "[t]here was insufficient evidence proving [he] caused the accident where the victim darted in front of moving traffic outside of a crosswalk." He contends he therefore should only have been found guilty of leaving the scene of a fatal accident, a less serious crime. "When a defendant claims that evidence is insufficient to support a verdict, the appellate court does not reweigh the evidence." *State v. Jones*, 188

Ariz. 388, 394, 937 P.2d 310, 316 (1997). "Rather, it must view the evidence in the light most favorable to the state and thereby ascertain whether substantial evidence exists to sustain the verdict." *Id.* "'If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *Id., quoting State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981) (alteration in *Jones*).

¶7 Section 28-661(A), A.R.S., provides that the driver of a vehicle involved in an accident that results in death or injury shall "[i]mmediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene." The person also has a duty to give his or her name, address, and vehicle registration number and to assist the injured person. A.R.S. §§ 28-661(A)(2), 28-663(A). A driver failing to comply with these requirements can be found guilty of a class four felony, unless the driver caused the accident, in which case it is a class three felony. § 28-661(B). The purpose of this statute is to "'prohibit drivers from seeking to evade civil or criminal liability by escaping before their identity can be established.'" *State v. Powers*, 200 Ariz. 363, ¶ 9, 26 P.3d 1134, 1135 (2001), *quoting State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995).

¶8 Hodges argues that Hemphill's actions were the cause of the accident, and "Hodges' failure to prevent the accident is not criminal causation." Section 13-203(A), A.R.S., provides that "[c]onduct is the cause of a result" when "[b]ut for the conduct the

result in question would not have occurred."[1] *See also State v. Marty*, 166 Ariz. 233, 236, 801 P.2d 468, 471 (App. 1990) ("To establish legal cause, or cause-in-fact, there must be some evidence that but for defendant's conduct, the accident and resulting death would not have occurred."). The state presented evidence that, if Hodges had been driving at the speed limit, the accident would not have occurred because Hodges could have stopped before he struck Hemphill. This was all that was required. *See Jones*, 188 Ariz. at 394, 937 P.2d at 316. Moreover, the evidence clearly established that Hodges violated A.R.S. § 28-792(A) and (B). And, as the state correctly notes, "whether [Hemphill] was partially . . . at fault for the collision is irrelevant because the State merely had to establish that [Hodges] was a cause of the collision—not that he was the only cause." (Emphasis deleted.) *See Marty*, 166 Ariz. at 237, 801 P.2d at 472 (although defendant's actions were not "only cause of the accident" in which minor died, causation established because, "[a]bsent defendant's supplying of drugs and alcohol, this accident would have never occurred") (emphasis deleted).

¶9 Hodges also asserts the trial court erred in failing to properly instruct the jury that Hemphill's actions could be an intervening or superseding cause. Hodges admits he did not request such an instruction and that he has therefore waived all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly

[1]Section 13-203(A) also requires that "[t]he relationship between the conduct and result satisf[y] any additional causal requirements imposed by the statute defining the offense," but A.R.S. § 28-661 provides no additional causal requirements.

have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. And, before engaging in fundamental error analysis, we must first find error. *Id.* ¶ 23; *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

¶10 Hodges notes that the jury, during its deliberations, asked the court "whether degrees of fault can be assigned." Hodges repeatedly objected to the court's giving any answer to the jury's question. The court instructed the jury: "In a civil case a jury may allocate percentages of fault to two or more persons so money damages may be apportioned. In a criminal case, such as this, there is no provision for allocation of fault."

¶11 Hodges here asserts the trial court should have sua sponte given the following instruction:

> To warrant a conviction . . . the death must be the natural and continuous consequence of the unlawful act and not the result of an independent intervening cause in which the accused does not participate, and which he could foresee [sic]. If it appears that the act of the accused was not the proximate cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, such supervening cause is a defense to a charge . . . .

The above language is taken from a proposed instruction the trial court rejected in *State v. Sucharew*, 205 Ariz. 16, ¶ 28, 66 P.3d 59, 68 (App. 2003). There, Division One of this court upheld the trial court's refusal to give this instruction because of the adequacy of the given instructions. *Id.* ¶¶ 32, 33. The instructions here were similarly adequate. Hodges

does not explain why we should hold otherwise and mandate this instruction, and we decline to do so.

¶12 Our supreme court has stated that "an intervening event becomes a legal excuse, *i.e.*, a superseding cause only when 'its occurrence was both unforeseeable and when with benefit of hindsight it may be described as abnormal or extraordinary.'" *State v. Bass*, 198 Ariz. 571, ¶ 11, 12 P.3d 796, 800-01 (2000). Hodges's argument that Hemphill's actions constituted a superseding cause is flawed for two reasons: a pedestrian's attempt to cross a street is neither abnormal nor extraordinary, and Hemphill's act in doing so was lawful, *see* A.R.S. §§ 28-601(3)(A) and 28-793(A). The trial court did not err, fundamentally or otherwise, in not instructing the jury to consider whether Hemphill's actions could have been an intervening or superseding cause.

Disposition

¶13 We affirm Hodges's conviction and placement on probation.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge